Nos. 387, 388.

# In The Supreme Court of the United States

OCTOBER TERM, 1942.

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

v.

BANKERS TRUST COMPANY, TRUSTEE.

*ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR PETITIONER.

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## BRIEF FOR THE PETITIONER.

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### OPINIONS BELOW.

The opinion and order of the District Court (R. 87-88) is not reported; the opinion of the Circuit Court of Appeals (R. 102) is reported in 129 F. (2d) 122.

### JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 10, 1942 (R. 108). The petition for certiorari, filed September 10, 1942, was granted on October 26, 1942.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Sections 24(c) and 77 of the Bankruptcy Act.

## QUESTION PRESENTED.

Whether the District Court having jurisdiction over a railroad reorganization under Section 77 of the Bankruptcy Act may make an allowance to an indenture trustee for services rendered in connection with the reorganization proceedings and plan without prior reference to the Interstate Commerce Commission for the fixing of a maximum allowance in accordance with the procedure provided by Section 77(c)(12) of that Act.

## STATUTE INVOLVED.

Section 77(c)(12) of the Bankruptcy Act (47 Stat. 1474, 11 U. S. C., Section 205(c)(12) as amended) provides:

> "(12) Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith *by trustees under indentures*, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing

> if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c)." (Italics added.)

Other portions of Section 77 are set out in Appendix A *infra*, pages 37-58.

## STATEMENT.

The St. Louis-San Francisco Railway Co. (hereinafter sometimes referred to as the "Frisco") filed its petition, on May 16, 1933, under the provisions of Section 77 of the Bankruptcy Act in the District Court for the Eastern District of Missouri. The petition was approved by the court on May 17, 1933. (R. 2.) Part of the Frisco system was formerly known as the Kansas City, Fort Scott & Memphis Railway, and Bankers Trust Company, respondent herein, is the successor corporate trustee under the refunding mortgage covering the line and certain other property of the Kansas City, Fort Scott & Memphis Railway Co. (R. 2-3.) Bankers Trust Company (hereinafter referred to as the Indenture Trustee) petitioned for and was granted leave to intervene before the District Court (R. 24) under Section 77 (c) (13) and before the Interstate Commerce Commission. (R. 25.) The Indenture Trustee has thus been a party to the proceedings for the reorganization of the Frisco, both before the District Court and before the Interstate Commerce Commission, and it has actively participated in such proceedings. (R. 10, 14-33.)

On December 30, 1940, the District Court, having before it a plan for the reorganization of Frisco approved by the Interstate Commerce Commission, directed the filing of:

> "All petitions for allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred either under clause (12) of subsection (c) of Section 77 of the Bankruptcy Act or otherwise * * *." [R. 6, 7.]

Pursuant to this order, the Indenture Trustee filed two petitions for allowances, for services rendered and expenses incurred by it in the reorganization proceedings, one being numbered 266 and the other 267. The total amount of the allowance asked in each petition was $26,792.16, of which $10,000 was asked for the services of the Bankers Trust Company as corporate trustee under the refunding mortgage, $16,000 for fees of its counsel, and the balance for expenses. (R. 14, 30-31, 83, 85.) In Petition No. 267 compensation is asked pursuant to Section 77(c)(12) for the identical services and expenses covered by Petition No. 266, but the right to object to the jurisdiction of the Interstate Commerce Commission is reserved. Petition No. 267, in compliance with the order of the court, was referred to the Interstate Commerce Commission for the fixing of a maximum. (R. 3.) Before action by the Commission upon Petition No. 267, Petition No. 266 came on for hearing before the District Court.

In Petition No. 266, the Indenture Trustee alleged that the services and expenses for which compensation was asked "have not been rendered or incurred 'in connection with the proceedings and plan' " for the reorganization of the debtor but were rendered and incurred as trustee under the indenture in performance of its obligations thereunder for the benefit of the trust estate as distinguished from the debtor's estate. (R. 26-27.)

Petition No. 266 was opposed by the trustees of the debtor and by the Reconstruction Finance Corporation, a creditor[1] and a party by intervention (R. 3-4, 86). The District Court on June 30, 1941 held (R. 87), without giving reasons, that Section 77(c)(12) was not applicable to Petition No. 266, and that under the provisions of the mortgage the claim was a proper charge on the trust estate subject to the mortgage. The court made no finding as to whether the services ren-

[1] Reconstruction Finance Corporation holds as pledgee 5.4 per cent of the St. Louis-San Francisco Consolidated Mortgage Bonds under which mortgage 45.6 per cent of the outstanding Kansas City, Fort Scott & Memphis bonds are pledged.

dered and expenses incurred were or were not in connection with the reorganization proceedings and plan. It directed the Indenture Trustee to pay to itself the *full amount* of its claim out of the cash on deposit with it as trustee under the mortgage. (R. 88.)

Meanwhile, the Interstate Commerce Commission held hearings, as required by Section 77(c)(12), on the propriety and reasonableness of the amounts claimed in Petition No. 267 and by the petitions of others filed in accordance with the court's order of December 30, 1940. By its report and order of August 27, 1941, the Commission held that it had jurisdiction to fix a maximum limit for all services and expenses covered by Petition No. 267 which were rendered in connection with the proceedings and plan during the pendency[2] of the Section 77 proceedings. *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195, 218, 236. In said report the Commission concluded (p. 235): "That in view of the nature and extent of the services rendered by the petitioners, their counsel and technical advisers, the contributive value thereof, and the benefit accruing to the debtor's estate, we should fix the following maximum limits of final allowances to be paid out of the debtor estate . . ." The Commission then fixed maxima on Petition No. 267 for the indenture trustee and its counsel as follows:

| | Amount claimed | | Maximum fixed | |
|---|---|---|---|---|
| | Fee | Expenses | Fee | Expenses |
| Bankers Trust Company, Trustee | $10,000 | $587.89 | $2,500 | $587.89 |
| White & Case, Counsel | 10,000 | 179.99 | 3,500 | 157.29 |
| Bryan, Williams, Cave & McPheeters, Counsel | 6,000 | 24.28 | 2,000 | 11.76 |
| | $26,000 | $792.16 | $8,000 | $756.94 |

The District Court took no action on this part of the Commission's report and order.

Reconstruction Finance Corporation appealed from the order of the District Court on Petition No. 266 to the Circuit Court of Appeals, both under the provisions of Rule

[2] This is discussed *infra* p. 25.

73 of the Rules of Civil Procedure and by appeal to the discretion of the Circuit Court of Appeals. (R. 1 and 93.) That court granted the latter appeal and ordered that the two appeals be consolidated. (R. 97.) The appeal was supported by the Interstate Commerce Commission which filed a brief *amicus curiae*.

The Circuit Court of Appeals affirmed the judgment of the District Court, holding that, although the services were "in a literal sense" incurred in connection with the proceedings and plan, that fact was not controlling.

## SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that paragraph (c)(12) of Section 77 of the Bankruptcy Act, as amended, was not applicable to the claim of Bankers Trust Company, as Indenture Trustee under the refunding mortgage of the Kansas City, Fort Scott and Memphis Railway Company, dated August 23, 1901, for an allowance of compensation and expenses for its services in the Section 77 railroad reorganization proceedings as such Indenture Trustee.

2. In affirming the order granting an allowance to Bankers Trust Company, as Indenture Trustee, of compensation and expenses, including attorneys' fees, for services rendered prior to the fixing of maximum limits thereon by the Interstate Commerce Commission as required by paragraph (c)(12) of Section 77 of the Bankruptcy Act, as amended.

3. In finding that, although the services of the Bankers Trust Company and its attorneys were in connection with the proceedings and plan within the provisions of paragraph (c)(12) of Section 77, that fact was not legally controlling.

4. In affirming the order granting an allowance to the Bankers Trust Company for compensation and expenses for services as Indenture Trustee which were in connection with

the proceedings and plan in the absence of the fixing of maximum limits by the Interstate Commerce Commission.

5. In approving the making of an allowance of compensation to Bankers Trust Company, as Indenture Trustee, on Petition No. 266 when Petition No. 267 covering identical services had theretofore been transmitted by the District Court to the Interstate Commerce Commission for the fixing of maximum limits, which Petition had not then been acted upon by the Interstate Commerce Commission.

6. In failing to dismiss Petition No. 266 for an allowance of compensation and expenses.

7. In failing to reverse the order, judgment and decree of the District Court.

## SUMMARY OF ARGUMENT.

Both the language and the legislative history of Section 77(c)(12) make clear that it was the intent of Congress to include the compensation and expenses of indenture trustees within the regulatory provision.

A study of the fee petitions filed in other railroad reorganization proceedings reveals that the only method of interpreting the statute that would accomplish its purpose, which was to insure reasonable limits on reorganization costs, is to include the compensation and expenses of Indenture Trustees because these have formed about one-third of the total amounts claimed or allowed. See Petition for Certiorari, pp. 12, 27.

The Indenture Trustee contends that since Section 77(c)(12) refers to "an allowance to be paid out of the Debtor's estate", it does not include an allowance which should be paid out of the res subject to its mortgage. This interpretation of "Debtor's estate" is untenable. "Debtor's Estate" as used in Section 77(c)(12) embraces the total assets of the Debtor.

The Indenture Trustee alleged that the services rendered and expenses incurred for which compensation is asked

were not rendered or incurred "in connection with the proceedings and plan" for the reorganization of the Debtor. But the facts demonstrate the contrary. An examination of the Trustee's petition and supporting affidavits demonstrates that the services were in fact rendered in connection with the proceedings and plan. We do not contend that services rendered prior to the reorganization proceedings or routine administrative services are covered by the statutory provision in question.

The Indenture Trustee has argued that it has a vested property right or an inviolable contract right to compensation to be determined by the judgment of a court. We submit that the indenture created no such right. At most a lien for compensation would be inchoate until the services were performed, and here they were performed subsequent to the statute and the institution of the reorganization proceedings. Moreover, the contract right related to foreclosure rather than to bankruptcy reorganization procedure. In any event no such contract right could escape the power of Congress to establish a new procedure under its bankruptcy and commerce powers.

The procedure provided by the statute is subject to no constitutional objection. Whether the maximum allowance fixed by the Commission may be disapproved by the court as inadequate is not entirely clear from the statute, and courts have reached different conclusions on the question. No court, however, has held the procedure invalid. We suggest that the statute permits review by the district court of a maximum fixed by the Commission. In any event, the procedure is constitutional. The function entrusted to the Commission is particularly appropriate for performance by that tribunal. Moreover, the Indenture Trustee is in no position to challenge the procedure since it elected to perform the services and incurred the expenses in question subsequent to the establishment of the statutory procedure, which in fact gives claims for these services and expenses the status of administrative expenses. Finally, statutes making determinations such as that here involved conclusive have repeatedly been sustained.

## ARGUMENT.

### INTRODUCTORY STATEMENT.

The issue presented in this case, to be resolved intelligently, should be approached from the standpoint of the fundamental purposes of Congress in enacting Section 77 of the Bankruptcy Act, as amended. The purposes of that legislation included, among others, regulation of the costs of railroad reorganization, to the end that those costs should be kept within reasonable bounds in the public interest.[3] To implement that regulation, Section 77 conferred on the Interstate Commerce Commission the power to fix maximum limits on the amounts payable for compensation and expenses out of the estates of the bankrupt railroads to various parties interested in reorganization proceedings.

The question here involved is whether a trustee under an indenture of mortgage on a railroad undergoing reorganization is *subject to* or *exempt from* this regulatory power.

The language of Section 77(c)(12), *supra* p. 2, in terms embraces an indenture trustee. The legislative history supports this view of the statutory text. The purpose of the legislation—to keep costs within reasonable bounds—would be in a large measure defeated if mortgage trustees are to be exempted from the statutory regulation.

Before considering Section 77(c)(12) itself, it will be illuminating to summarize the extensive provisions of the Act as a whole as it relates to the broad purpose of Congress to restrict reorganization costs to reasonable bounds and to devise a system of control for such costs. Relevant parts of the Act appear in Appendix A.

The Commission is empowered to fix maximum limits on the compensation of the bankruptcy trustee and of the trustee's counsel, Section 77(c)(2); and it is empowered to authorize the solicitation of proxies, authorizations and deposit agreements, if it finds them reasonable, after consideration of their terms, including the terms therein governing the compensation and expenses of applicant, agents and attorneys for their services, Section 77(p).

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[3] See *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, 294 U. S. 648, 685.

The court is required to scrutinize those proxies and deposit agreements, which, by reason of their existence prior to August 27, 1935, are not passed on by the Commission, and the court is empowered to restrain the exercise of any power therein found to be unfair, "including the collection of unreasonable amounts of compensation and expenses", Section 77(p). Further, the court is given power to make orders for payment of "reasonable administrative expenses and allowances" incurred in reorganization in any prior proceedings pending at the time the Section 77 proceedings begin, Section 77(i); and to allow to any master "reasonable compensation for his services and actual and reasonable expenses," Section 77(c)(13).

These various provisions, woven into the very fabric of the Act, form a pattern whose unmistakable design reveals the diligence with which Congress sought to effect its purpose to place the costs of railroad reorganization under the firm and continuous control of responsible administrative and judicial agencies. And, with the exception of the rulings below in the case at bar, the courts have uniformly construed the Act in such manner as to carry out the legislative purpose.

The question here involved was passed on by the District Court for the District of Connecticut in the New York, New Haven & Hartford reorganization proceedings. There, in a carefully considered opinion, Judge Hincks ruled adversely on the contentions of Bankers Trust Company, an Indenture Trustee in those proceedings, being the same contentions which it urged in the courts below in this proceeding. The complete text of Judge Hincks' opinion is printed in Appendix B to this brief, *infra*, p. 59. See, in accord: *In re Chicago, M. St. P. & R. Co.*, 121 F. (2d) 371 (C. C. A. 7th); *In re Missouri Pacific R. Co.*, 39 F. Supp. 436 (E. D. Mo.); *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230 (N. D. Ill.); *In re Chicago, G. W. R. Co.*, 29 F. Supp. 149 (N. D. Ill.); *In the Matter of The Fort Dodge, Des Moines & Southern R. Co.*, Appendix C, *infra*, p. 67.

## I.

SECTION 77 OF THE BANKRUPTCY ACT VESTS IN THE INTERSTATE COMMERCE COMMISSION JURISDICTION TO FIX THE MAXIMUM LIMITS ON AMOUNTS PAYABLE OUT OF THE DEBTOR'S ESTATE AS COMPENSATION FOR SERVICES RENDERED AND EXPENSES INCURRED BY INDENTURE TRUSTEES (INCLUDING FEES AND EXPENSES OF THEIR ATTORNEYS) IN CONNECTION WITH THE PROCEEDINGS AND PLAN OF REORGANIZATION.

The explicit terms of Section 77(c)(12) embrace allowances to trustees under indentures. That their claims are to be treated no differently from those of the other enumerated classes of persons is the position consistently taken by the Interstate Commerce Commission[4] and required, we submit, not only by the language of the Act but by its legislative background.

In its report to Congress for 1932 the Commission recommended that the subject of railroad receiverships and reorganizations be considered to the end that needed legislation might be enacted to reduce the time and cost involved. That report, at p. 15, stated that the existing procedure impeded adequate service and imposed on the public and on the security holders losses and expenses that were frequently burdensome and unnecessary.[5]

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[4] See especially *Chicago and Eastern Illinois Railway Company Reorganization*, 233 I. C. C. 267, 273; *Chicago, Milwaukee, St. Paul & Pacific Railroad Co. Reorganization*, 242 I. C. C. 113; *Erie Railroad Co. Reorganization*, 242 I. C. C. 517; *New York, New Haven & Hartford Railroad Company Reorganization*, 247 I. C. C. 677; *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195, 220, 236 (applying this rule to Petition No. 267); and *St. Louis Southwestern Railway Company Reorganization*, 233 I. C. C. 456, 457-59.

The Securities and Exchange Commission, in administering Section 11(f) of the Public Utility holding Company Act, has taken the same position, the language of the Act being less explicit; " . . . any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding . . . . " See *West Ohio Gas Co.*, 4 S. E. C. 931, 947; *York Railways Co.*, Holding Company Act Release No. 3876, Nov. 3, 1942.

[5] 46th Annual Report of the Interstate Commerce Commission, December 1, 1932.

The decision of this Court and the dissenting opinion of Mr. Justice Stone in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 282 U. S. 311, brought the problem to a sharp focus. There the Commission, in the exercise of its powers over the issuance of securities, attempted to regulate reorganization expenses by approving the issuance of securities[8] of the reorganized company upon condition that a special fund created for payment of expenses would be subject to the Commission's control. This Court held that the condition was beyond the Commission's statutory jurisdiction.

In considering the case at bar in relation to the objectives sought to be accomplished in the enactment of Section 77 as disclosed in its language and legislative history, it is noteworthy that in the *Milwaukee* case, *supra*, part of the fund which the Commission attempted to regulate was reserved for the payment of compensation to indenture trustees (282 U. S. 311, 320).

When legislation was introduced on January 21, 1933, in the form of H. R. 14359, providing for railroad reorganizations under the Bankruptcy Act, it contained provision empowering the Commission to fix the specific compensation payable—

> "to reorganization managers, special referees, trustees, officers, parties in interest, committees, or other representatives of creditors or stockholders for services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and plan * * *."

A similar bill was introduced in the Senate on January 31, 1933, by Senator Hastings. On February 24, 1933, he submitted an amendment to H. R. 14359 of which paragraph (c)(8) provided for the fixing of maximum limits, as follows:

> "(The judge) may, within such maximum limits as are fixed by the commission, as elsewhere provided in subdivision (f) of this section, allow a reasonable compensation for the services rendered and reimbursement

[8] Interstate Commerce Act, § 20(a).

for the actual and necessary expenses incurred in connection with the proceeding and plan by officers, parties in interest, reorganization managers, and committees or other representatives of creditors or stockholders, and by their attorneys or agents, * * *".

The last clause of the above-quoted provision was for clarity amended to read: "and the attorneys or agents of any of the foregoing." On March 1, 1933, the House concurred in the Senate amendment, and the bill became law on March 3, 1933 with paragraph (c)(8), as above quoted, authorizing the Commission to fix the maximum limits for compensation and expenses. 47 Stat. 1474, 1476.

In 1935, Section 77 was revised to correct shortcomings not apparent when the Act of 1933 went into effect. Among other provisions, that with respect to reorganization expenses was amended to limit still more strictly allowances for compensation.[7] That amended provision is now in force as paragraph (c)(12) of Section 77.

The reports of Congressional Committees[8] and the discussions[9] in Congress all show emphatically that the purpose of Congress was to safeguard the new railroad reor-

[7] The 1933 Act, paragraph (c)(8), differed chiefly from paragraph (c)(12) of the 1935 Act in that it allowed compensation in addition to expenses to all parties in interest. The 1935 Act limits compensation to indenture trustees, depositaries and assistants employed by the Commission. It does not authorize payment of compensation to mere "parties in interest". The change was thus explained by Senator Wheeler (79 Cong. Rec., 13765): "The present provisions of section 77 allow both expenses and fees to be paid to the designated interested parties out of the debtor's estate. This was regarded as an invitation to exploitation. The House Judiciary Committee, consequently, eliminated fees entirely, allowing only expenses. On further investigation it found that this was too rigorous. The effect of the amendment is to allow expenses to all the interested parties and fees only to trustees under indentures, depositaries, and such assistants as are especially employed by the Commission with the approval of the judge."

[8] 74 Cong. 1st Session, Senate Report No. 1336, August 16, 1935; 74 Cong. 1st Session, H. R. Report No. 1283, June 21, 1935.

[9] 76 Cong. R. 2917, 5128, 5129, 5130, 5358; 79 Cong. R. 13307, 13765.

ganization procedure from the evils of extravagant expense that had marked the old receivership foreclosure procedure. Particularly evident is the intent to prevent a recurrence of the evasion of administrative control over reorganization expenses which had been accomplished in the *Milwaukee* case, *supra*. Discussing the Senate amendment which became law in paragraph (c)(8) of the Act of 1933, Representative LaGuardia said (76 Cong. R. 5358):

> "* * * We have taken the views in the minority opinion in the Chicago, Milwaukee & St. Paul Railroad case, even to the extent that all incidental and indirect costs, expenses, and fees are subject to the control of the Interstate Commerce Commission, and have written that into the law.
>
> "In this case, you will remember over $7,000,000 was spent in reorganization. The same gang that is now seeking to defeat this bill appeared as attorneys or counsels or managers in that case and received over $1,600,000 in fees. There you had a plan approved by the Interstate Commerce Commission and another modified plan approved by the court. This would be impossible under this bill.
>
> "So, all that the House has to decide at this late hour, Mr. Speaker, is whether or not, receiverships being inevitable, under present conditions, we can, as far as the law permits, control these reorganizations, prevent the abuses of the past, prevent the looting of these railroads, and in the public interest put this under the proper and honest supervision of the Interstate Commerce Commission."

The history of this legislation demonstrates indubitably that there was never any notion that reorganization expenses should be segregated so as to include some under the Commission's power to fix maximum limits and to exclude others. The undoubted purpose was to insure that *all expenses* of reorganization, payable out of the debtor's estate (as distinguished from private sources) were under the coordinated regulatory power of the Commission and the courts.

This purpose becomes even clearer when it is remembered that the services rendered and expenses incurred by indenture trustees are not distinguishable in character from those rendered by reorganization managers, committees and other representatives of various security holders. The object being to control costs as a whole, it is evident that the exemption of an important class of costs would mark a long step towards the defeat of the legislative purpose.

The language employed in the Act translates this obvious intent into law. The provisions of Section 77 relating to expenses of reorganization are far-reaching. Paragraph (c) (2) provides that the reorganization "trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable." Paragraph (c) (12) provides for the payment out of the debtor's estate within maximum limits prescribed by the Commission of the actual and reasonable expenses incurred in connection with the proceeding and plan by "parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders," by "trustees under indenture, depositaries, and such assistants as the Commission with the approval of the judge may especially employ." Here is a specific reference to indenture trustees. Their claim for reimbursement and compensation is grouped with all other parties in interest and their representatives. Certainly in the broad sweep of powers so granted by a remedial statute—having in mind that no distinction is made with respect to indenture trustees, no special rights conferred or exemption granted by the language of the statute—it cannot be said that the expenses here claimed have been excepted. Such expenses are substantial enough, as is evidenced in this and comparable reorganization cases,[10] to constitute a weighty factor in the formulation and adop-

[10] In nine of the large reorganizations, they constituted 36.6% of all amounts claimed or 28.6% of all maxima fixed. See Table p. 27 of Petition for Certiorari.

tion of a plan of reorganization and justify the assumption that they would have been expressly excluded had that been the legislative intent.

Furthermore, paragraph (c) of Section 77, providing for the approval of the plan, requires that the judge shall satisfy himself that "the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge."

Here the words "incident to the reorganization" are indicative of the scope of the phrase "in connection with the proceedings and plan" as used in paragraph (c) (12). Whether services and expenses arise out of claimed pre-existing contractual rights or otherwise, if they arise in connection with the proceedings and plan or are incidental thereto, they have been made subject to the Commission's power to fix maximum limits.

In the light of the statutory language, to uphold the Indenture Trustee's position requires that the specific terms of the Act be given no effect whatsoever.

## II.

### "DEBTOR'S ESTATE" AS USED IN SECTION 77(c)(12) EMBRACES THE TOTAL ASSETS OF THE DEBTOR.

The Indenture Trustee contended below that since Section 77(c)(12) refers to "an allowance to be paid out of the Debtor's estate", it does not refer to an allowance which, it contends, should be paid out of the estate subject to the lien of the mortgage. (R. 27). This narrow interpretation of the statutory reference to "Debtor's estate" is erroneous.

The court below rejected that contention, saying (R. 105):

> "We may also agree with the appellant's contention that the debtor's estate, within the meaning of Sec.

77(c)(12) of the Bankruptcy Act, includes all of the debtor's property, encumbered and unencumbered, *Continental Ill. Bank & Tr. Co.* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648, 55 Sup. Ct. 595, 79 L. Ed. 1110, and that the payment of the claim out of property in the hands of appellee as trustee under the refunding mortgage is in fact payment out of the estate of the debtor."

The district court below did not discuss this point. But the District Court for the District of Connecticut has discussed and rejected this contention, specifically holding:

"And certainly the construction advanced by the petitioners [Bankers Trust] is inadmissible. They point to the language of (c)(12) under which the court may order the allowances thereby authorized to be paid 'out of the debtor's estate'. I agree that this language is broad enough to authorize in a proper case payment from the free (unmortgaged) assets of the estate. In this respect, perhaps the Act goes further than the equitable rule whereby allowances for services in behalf of mortgaged property might be charged against the mortgaged assets. But I cannot agree that the scope of (c)(12) is limited to such allowances as may only be charged against the general (unmortgaged) estate. The language used, viz., 'the debtor's estate', is broad enough to include the mortgaged assets as well as the free assets. And if the *enforcement* provisions of (c)(12) are entitled to this broad construction, as I hold, there is no room left for the argument that the *liquidation* provisions of (c) (12) with the accompanying grant of jurisdiction to the Commission must by a narrower process of construction be confined to services not covered by lien." [Unreported opinion; for full text see Appendix B, *infra* p. 59.]

The statute provides that "The railroad corporation shall be referred to in the proceedings as a 'debtor' ". [Subsection (a)]. No definition is provided for the term "debtor's estate". The latter phrase is used six times in the act, in addition to the use in Subsection (c)(12). Five of these uses refer to compensation or expenses:

(1) "The trustee or trustees and their counsel shall receive only such compensation from the *estate of the debtor* as the judge may from time to time allow

within such maximum limits as may be approved by the Commission as reasonable." [Subsection (c)(2); italics added.]

(2) "It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon request therefor . . . The judge may direct that the cost of preparing such information shall be borne by the *debtor's estate.*" [Subsection (c)(5); italics added.]

(3) "The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission as will permit of such segregation and allocation . . .; and thereafter such segregation and allocation may be made at the expense of the *debtor's estate.*" [Subsection (c)(10); italics added.]

(4) "The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report . . . The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the *debtor's estate.*" [Subsection (c)(11); italics added.]

(5) "The plan shall then be submitted by the Commission to the creditors . . . and stockholders . . . The expense of such submission shall be certified by the Commission and shall be borne by the *debtor's estate.*" [Subsection (e); italics added.]

The sixth reference to the debtor's estate is contained in a broad direction to abandon property, if abandonment is in the interest of the "debtor's estate":

(6) "The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings *in the interest of the debtor's estate* and of ultimate reorganization but without unduly or adversely affecting the public interest . . ." [Subsection (o); italics added.]

In addition there is one reference to the word "estate" unmodified by the word "debtor":

> "... the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may upon notice and for cause shown enjoin or stay the commencement or continuance of any judicial proceeding to enforce any *lien upon the estate* until after final decree: ..." [Subsection (j); italics added.]

It is clear from these various uses that the statutory drafters intended that the phrase "Debtor's estate" should be interpreted broadly in its normal sense to mean the totality of assets of the Debtor whether pledged or unpledged, mortgaged or unmortgaged, which are under the jurisdiction of the court in the reorganization proceeding. Certainly no one would deny that the judge has a wide discretion to direct the payment of a reasonable trustee's salary from all the resources under his jurisdiction (usage 1). Similarly no one would challenge the use of all such resources for the cost of preparing lists of security holders (usage 2), or for the cost of making segregation studies (usage 3), or to pay the cost of a special report by the Commission (usage 4), or to pay the cost of conducting a ballot (usage 5). All these are costs of administration with priority over all liens. Knowing this, the statutory drafters deemed it sufficient to direct their payment *out of the Debtor's estate.*

Any such limited construction as that proposed by the Indenture Trustee would be utterly unrealistic. What is actually being reorganized in the Section 77 proceeding, and constitutes the Debtor's estate, is the totality of the assets of the Debtor, its roadbed, equipment, stations, real estate, stocks, bonds, and other property, including all mortgaged property and leaseholds. As Judge Barnes said in the Chicago and Northwestern reorganization, in reply to the contention of indenture trustees that certain cash pro-

ceeds of mortgaged property should be distributed to the bondholders (33 F. Supp. 230, 254,):

> "The line of railroad in question was subject to the lien of the mortgage. The proceeds of the sale of a part of said line are subject to the lien of the mortgage. Both the line and the proceeds of the sale of the line are property of the debtor. The property of the debtor, whether line of railroad or money in the hands of the Bankruptcy Trustee is being reorganized."

Whatever amounts may be paid to the Indenture Trustee, whether such payments come from the cash held by them or from any other sources, they will deplete *pro tanto* the amount which would otherwise constitute the reorganized estate. In every practical sense, therefore, any payment to the Indenture Trustee will be from Debtor's estate.

## III.

### THE SERVICES RENDERED AND EXPENSES INCURRED BY THE INDENTURE TRUSTEE AND ITS COUNSEL WERE RENDERED AND INCURRED "IN CONNECTION WITH THE PROCEEDINGS AND PLAN."

The Indenture Trustee's petition for allowances of compensation and expenses alleges that the services rendered and the expenses incurred for which compensation is asked "have not been rendered or incurred 'in connection with the proceedings and plan'" for the reorganization of the debtor but were rendered and incurred as trustee under the indenture in performance of its obligations thereunder for the benefit of the trust estate (R. 26-27). This allegation is contradicted by the description of the services as set forth in the petition and affidavits further discussed hereunder. The district court *made no finding* as to whether the services rendered and expenses incurred were or were not in connection with the reorganization proceedings and plan. However, the Circuit Court of Appeals in its opin-

ion held that the services were "in a literal sense" incurred in connection with the proceedings and plan but stated that this fact was not controlling. It said (R. 106):

> "Nor is the fact that the service of appellee may have been rendered and its expenses incurred in connection with the reorganization plan and proceedings controlling on the question here. In a literal sense they were because they were made necessary by the reorganization proceedings. The officers of appellee and its counsel gave attention to the steps taken in the proceedings and attended hearings before the court and the Commission. They took part in conferences in regard to the status of the proposed plan of reorganization and in meetings held to work out new plans." (R. 106.)

Clearly, Section 77(c)(12) demands that services and expenses which come within its purview must be "incurred in connection with the proceedings and plan." It is equally clear that the services here under discussion (except for a certain limitation in period discussed below) were rendered in connection with the proceedings and plan.

The petition for allowance states that petitioner and its counsel actively participated in the proceedings and efforts to reorganize the debtor, (R., p. 18) viz.:

> "That during the period referred to in the preceding paragraph, the responsibility of the Corporate Trustee to protect the mortgaged security entrusted to it and the rights of the holders of the Bonds secured thereby has required constant diligence on its part in following the proceedings herein, the proceedings had before the Interstate Commerce Commission in connection with this Reorganization and otherwise;"

The petition further shows that the Indenture Trustee intervened in the proceedings before the district court (R. 24) and in the proceedings before the Interstate Commerce Commission where the plans of reorganization were first considered (R. 25), attended the hearings before the Interstate Commerce Commission, studied and reviewed the vari-

ous plans and briefs before the Commission, considered a plan of reorganization proposed by a holder of Fort Scott bonds and conferred with him in regard thereto (R. 25).

It appears that the Indenture Trustee gave special attention to the following items, among others, arising in the course of the proceedings:

1. The proposal of the Debtor's Trustees to issue Trustees' certificates (R. 19);
2. The annual budgets of Debtor's Trustees (R. 19-20);
3. The equipment of Debtor and purchases and retirement of same (R. 20);
4. The abandonment of various branch lines and salvage (R. 20-21);
5. The printed record of this proceeding (R. 22);
6. Various petitions of Debtor's Trustees (R. 21-22).

It will be found in the record that most of the foregoing recitals state that they related to things done or to be done "pursuant to orders in these proceedings" (R. 20-23, inclusive).

The items of expense sought to be recovered by the Indenture Trustee consist mainly of fees paid to its attorneys. The affidavits concerning the services rendered by its New York and St. Louis counsel, both attached to Petition No. 266 (R. 35 and 60), indicate services of a character similar to that of the trustee. Naturally they cover the same activities. The connection of counsel's services with the proceedings and plan are shown particularly by the following extracts from the affidavits:

> "September (1933). * * * Telephone conference with Mr. Swaine, of Cravath, de Gersdorff, Swaine & Wood, in regard to the status of the pending plan of reorganization, the appointment of Trustees in bankruptcy, a conference to work out a new plan and other related matters" (R. 39).

"December (1933). Consideration of transcript of proceedings at Washington and conference concerning reorganization plans of the Debtor" (R. 41).

"July (1934). * * * Correspondence with Corporate Trustee and consideration of order of Interstate Commerce Commission for determination of question whether the Debtor is insolvent" (R. 44).

"March (1935). * * * Consideration of petition and order for examination by Debtor's Trustees of former directors and bankers for the Debtor" (R. 45).

"September (1935). Consideration of report and order of Interstate Commerce Commission relating to the application of the Central Hanover Bank for services in the foreclosure proceedings which preceded the proceedings in Section 77 and letter to the Corporate Trustee thereon" (R. 46).

"November (1936). * * * Further office conference on hearing on December 1 [I. C. C. hearing Dec. 1, 1936], on that Petition [Bankers Trust Company's petition to intervene before I. C. C.], and on the plan of reorganization expected to be submitted" (R. 48).

"December (1936). * * * Attending hearing before the Interstate Commerce Commission on the plan of reorganization" (R. 49).

"April (1937). * * * Correspondence regarding extension of time for Debtor to file a plan of reorganization" (R. 50).

"November (1937). * * * Examined proposed Plan of Reorganization for the Debtor. Conferences with the Corporate Trustee in reference to proposed expenditures of the Debtor for 1938 and certain points in the Plan of Reorganization" (R. 51).

"October (1938). * * * Conferences with the Corporate Trustee in regard to the proposed Plan of the three Committees and the question of lien on equipment. Examined Plan of Reorganization proposed by the three Bondholders Committee. Conference with the Corporate Trustee considering that Plan. Further study of that Plan. Office conference and conference with the Corporate Trustee re approaching I. C. C. hearing. * * *" (R. 54).

"January (1934). * * * Legal research and correspondence with White & Case regarding authority to issue trustee's certificates * * *" (R. 67).

"October (1934). Attendance at hearing before Special Master on proposed investigation as to solvency or insolvency of Debtor; * * *" (R. 72).

"June (1936). Correspondence with counsel for Debtor and with White & Case with reference to application for extension of time for filing plan of reorganization; Consideration of answer of Railroad Credit Corporation to petition for extension of time for filing plan of reorganization; Attendance at Federal Court;" (R. 75).

Thus it is clear from the allegations and statements of the petition and affidavits set out above and from others in the record that the Indenture Trustee and its attorneys have been active in the reorganization proceedings. The very nature of the services demonstrates that they were rendered "in connection with the proceedings and the plan."

To be sure, Bankers Trust was acting in its capacity as Indenture Trustee. Its endeavors to secure the best possible treatment in connection with the proceedings and the reorganization of the debtor and for the claim of the bondholders were, of course, in the performance of its duties as trustee, but these endeavors were occasioned or necessitated primarily by the proceedings and were rendered as a part of the proceedings to produce a plan. Had there been no proceedings, there would have been no occasion or necessity for the Indenture Trustee to consider any plan of reorganization or any of the other matters relating to the proceedings detailed in their petition.

The fact that the services were rendered as Indenture Trustee with a view also of preserving the mortgage estate does not alter the fact that they were rendered in connection with the proceedings and the plan.

Both in Petition 266 and in Petition 267, compensation is requested for services rendered and expenses incurred, in part, during a period prior to the Section 77 proceedings. We do not maintain that these services were "in connection

with the proceedings and plan". The Interstate Commerce Commission, in passing on Petition No. 267, properly declined to include, in the maximum, services rendered or expenses incurred in proceedings antedating the Section 77 reorganization. The Commission stated:

> "The maximum limits of allowances fixed hereinafter for this mortgage trustee and its counsel do not embrace any services rendered or expenses incurred in proceedings antedating the reorganization proceedings under section 77, since, in our opinion, allowances for such services and expenses are within the sole control of the bankruptcy court acting pursuant to section 77." [249 I. C. C. at 220.]

Likewise, routine administrative services seem to be not included within the statutory provision. By routine administrative services we mean those services which occur regularly year after year irrespective of the existence of a reorganization proceeding. The Indenture Trustee calls these "administrative services" and states (R. 30):

> "That this Petition does not include certain administrative services for which the Corporate Trustee has been paid by the Debtor's Trustees."

Such payment by bankruptcy trustees during a Section 77 reorganization without reference to the Interstate Commerce Commission for routine administrative service as ordinary operating expenses of the railroad is common practice in many of the Section 77 reorganizations. This seems proper where the amount involved in relation to all the circumstances is consistent with routine services. See *St. Louis-San Francisco Ry. Co. Reorganization*, 249 I. C. C. 195; *New York, New Haven & Hartford Railroad Reorganization*, 247 I. C. C. 677, 694-696.[11]

We submit, therefore, that under Section 77 no less than under the corporate reorganization provisions of Chapter X "the bankruptcy court has plenary power to review all fees and expenses in connection with the reorganization

[11] This distinction was specifically approved by the District Court in The *New Haven* Case. See Appendix B *infra* p. 61.

from whatever source they may be payable". *Woods* v. *City National Bank & Trust Company*, 312 U. S. 262, 267.

## IV.

THE TERMS OF THE INDENTURE CREATE NO RIGHT OR REMEDY BEYOND THE REGULATORY POWER CONFERRED ON THE COMMISSION BY CONGRESS.

The Indenture Trustee in the courts below relied heavily upon two provisions of the Indenture to establish its exemption from the Commission's regulatory power. The first of these is contained in Article Twenty-third of the Indenture which reads as follows (R. 17):

> "The Trustees shall be entitled to reasonable compensation for all services rendered by them in the execution of the trusts hereby created, which compensation as well as all reasonable expenses necessarily incurred and actually disbursed hereunder, the Railway Company agrees to pay and hereby charges on the trust estate."

The other of these provisions, in Article Seventeenth, states that in case of sale under power of sale or on a judicial sale, the purchase money, proceeds or awards shall be applied as follows (R. 17):

> "1. to the payment of the costs, expenses, fees and other charges of such sale, and a reasonable compensation to the Trustees, their agents and attorneys, and to the payment of all expenses and liabilities incurred and advances or disbursements made by the Trustees, and to the payment of all taxes, assessments or liens prior to the lien of this indenture, except any taxes, assessments or other superior liens subject to which such sale shall have been made."

These provisions, according to the contentions of the Indenture Trustee, had the following legal effects: (1) they created a contract claim and lien; (2) that claim and lien the Indenture Trustee is entitled to have enforced under laws in force in 1901 when the Indenture was executed; (3) the Indenture Trustee is entitled to compensation and expenses irrespective of whether the services rendered were directly and materially beneficial to the estate as a whole

and contributed to the accomplishment of a reorganization; and finally (4) the Indenture Trustee is entitled to a review by a court with power to raise as well as lower the limit fixed by the Commission.

Before considering the soundness of all of the asserted consequences of the alleged right, it will be illuminating to examine the right itself, for if the right should prove to be materially different from that claimed, it is clear that the legal incidents of it must likewise be different.

The provisions of the Indenture, written in 1901, antedated Section 77 by more than thirty years. They were written in contemplation of foreclosure as the effective remedy of enforcement. That was the remedy in common use at that time. Naturally, with the Indenture Trustee as the instrumentality through which that remedy would be enforced it was provided that after the sale the proceeds should be devoted in part to the payment of the Trustee for its services in the foreclosure proceeding.

But there has been no foreclosure or other judicial sale here. The remedy of foreclosure is in fact suspended while the Section 77 proceedings are pending.[12] And, while we do not deny that the Indenture Trustee may properly invoke paragraph (c)(13) of Section 77 and intervene in the proceedings (as it did in fact) it by no means follows that a compensation provision directed to activities in a foreclosure is controlling as to activities in prosecuting a wholly different remedy, namely a reorganization proceeding under Section 77. The distinction between reorganization and foreclosure is more one of substance than mere form. Indeed, various proceedings in the form of bankruptcy may be wholly different in substance, as Mr. Justice Cardozo observed when he said: "A proceeding to reorganize is not a bankruptcy [liquidation], though an amendment to the bankruptcy act creates and regulates the remedy." *Lowden v. Northwestern National Bank*, 298 U. S. 160, 163.

What has happened in fact is that a situation has arisen which was not specifically provided for in the Indenture.

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[12] *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648.

A new statutory procedure has been created, and the Indenture fails to provide any measure of compensation in express terms for services performed under the new procedure. In any event a lien for services under the Indenture would be at most inchoate until the services had been performed. Here performance occurred subsequent to the reorganization proceedings and subject to the provisions of and under an intervention permitted by Section 77. The "reasonable" value of that performance was certainly subject to appraisal and liquidation by a fair method under the paramount power of Congress over commerce and bankruptcy. *Cf. Kuehner v. Irving Trust Co.*, 299 U. S. 445; *Philadelphia, B. & W. R. Co. v. Schubert*, 224 U. S. 603.

When Section 77 proceedings were instituted the Indenture Trustee was charged with notice of all of the statutory provisions. It had an unfettered option to resign its trust, as expressly permitted by the Indenture,[13] or to proceed to participate in the reorganization proceedings. It voluntarily elected to do the latter. May it now brush to one side the conditions of the statute, ignore the legislative mandate that the Commission shall fix the maximum limit on its compensation, and collect more than three times the amount the Commission has found to be reasonable? We submit that it cannot. The decisions of this Court provide a conclusive answer to those who would enjoy the benefits, privileges, and rights conferred by legislation and then seek to set at naught the conditions which the legislature has attached to the enjoyment of those privileges and rights. *United Fuel Gas Company, et al. v. Railroad Commission of Kentucky, et al.*, 278 U. S. 300, 307, 308; *Hurley v. Commission of Fisheries of Virginia, et al.*, 257 U. S. 223, 225; and see p. 35, *infra*.

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[13] "Either trustee or any successor may resign and be discharged from the trust created by this indenture by giving written notice thereof to the Railway Company, delivered at or mailed to its last designated office or agency in the City of New York, three months before such resignation shall take effect or such shorter time as may be accepted as adequate, and by the due execution of proper conveyances." (Article Twenty-fifth.)

## V.

### THE STATUTORY PROCEDURE IS SUBJECT TO NO CONSTITUTIONAL OBJECTION.

The courts below did not pass on the question whether a maximum limit fixed by the Commission is subject to review by the district court. The District Court for the District of Connecticut has held that the court may disapprove the maximum as unreasonably low and remand to the Commission under the power of the judge to approve the plan only if he is satisfied that the expenses and fees are reasonable and are subject to his approval. See Appendix B, *infra*, p. 59. The question has not been presented in this form to other courts. Other courts have held that they cannot increase a maximum or grant an allowance to a claimant who was denied one by the Commission. These holdings are not in conflict with the ruling of the District Court for Connecticut. *In re Chicago; M., St. P. & P. R. Co.*, 121 F. (2d) 371 (C. C. A. 7th). See also, in accord, *In re Chicago & N. W. Ry. Co.*, 35 F. Supp. 230 (N. D. Ill.); *In re Chicago, G. W. R. Co.*, 29 F. Supp. 149 (N. D. Ill.). Respondent contends that no review of the maximum is provided, and that therefore the procedure is unconstitutional. No court has reached this conclusion, even though accepting the premise. Our position is that, while the statute is not entirely clear, judicial review of the maximum is permitted; and that whether this be true or not, the provision is plainly constitutional.

1. The following procedure is provided in Section 77 for determining the appropriate compensation for services and expenses incurred in connection with the proceedings and plan. Parties desiring reimbursement file with the court, frequently at the court's direction, petitions setting forth the services and expenses for which reimbursement is desired and usually stating the parties' views of the appropriate amount. The court clerk forwards a copy of the petition to the Interstate Commerce Commission. The

Commission must hold a hearing and then render a decision fixing maximum allowances deemed appropriate for the services and expenses:

> "The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c)." [Section 77(c)(12.]

Ordinarily after the Commission makes its decision, parties to the proceeding have the right to move for reconsideration, rehearing, or other relief. (Section 16(a) of the Interstate Commerce Act and Rule XV of the Rules of Practice before the Interstate Commerce Commission). This right has been used with some success by a number of parties in various proceedings. *New York, New Haven and Hartford Railroad Company Reorganization*, 217 I. C. C. 177; *St. Louis Southwestern Railway Company Reorganization*, 212 I. C. C. 471; *Missouri Pacific Railroad Company Reorganization*, 228 I. C. C. 187; 228 I. C. C. 570; *Denver & Rio Grande Western Railroad Company Reorganization*, 242 I. C. C. 721.

The report and order of the Commission with any modifications thereto which may have been made, and the full record including all testimony, orders, affidavits, exhibits, and other documents, are then forwarded to the bankruptcy court and

> "Within such maximum limits as are fixed by the Commission, the judge may make an allowance to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorneys fees) incurred in connection with the proceedings and plan . . ." [Section 77(c)(12)].

Thus the court's power to make allowances is limited by the Commission's findings of maximum limits. The court cannot allow more than the Commission's maximum. However, the court need not make an allowance to a party

simply because the Commission has set such allowance as a maximum; it can make a lower allowance, or can decide to make no allowance. For example, the court might find that the claimant had violated his fiduciary duties and was not entitled to any fee. *Wood* v. *City National Bank & Trust Co.*, 312 U.S. 262 (1941). Such partial or complete change of the result of the Commission's order would not require any reconsideration by the Commission, but would be completely within the court's power.

In addition, Congress provided a procedure by which the court must consider all orders granting allowances not merely when such orders are entered but also at the time the plan is approved. The statute specifically requires that when the judge approves a plan he must make findings that all fees and expenses are "reasonable" as well as within the maximum fixed by the Commission.

> "the judge shall approve the plan if satisfied that . . . (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, *are reasonable*, are within such maximum limits as fixed by the Commission; and are within such maximum limits to be subject to the approval of the judge." [Section 77(e); italics added.]

This provision can be construed to permit the court to consider whether the maximum is unreasonably low, and if so to withhold approval of the plan. If the judge does not approve the plan, he may dismiss the proceedings or refer them back to the Commission.

> "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in

which event, he shall transmit to the Commission a copy of any evidence received." [Section 77(e).]

If the suggested construction is sound, it should follow that the judge may refer back to the Commission, in advance of his final opinion on the plan, any opinion and order of the Commission setting a maximum for fees or expenses which in the judge's view would make it impossible for him under the Act to approve the plan. This has been done in *In the Matter of The New York, New Haven & Hartford* [Unreported opinion dated June 3, 1942.] though not in advance of the opinion on the plan. This course would conform to the conception of court and administrative agency as "brigaded" tribunals collaborating to a common end through "coordinated action." *United States* v. *Morgan*, 307 U. S. 183, 190; *Palmer* v. *Massachusetts*, 308 U. S. 79, 87; *Warren* v. *Palmer*, 310 U. S. 132, 138.

Should the Court thus refer back to the Commission an order setting a maximum, and the Commission, in due course, forward a second opinion and order which the Court again finds would make approval of the plan impossible, a second reference back could be made. This procedure involves no constitutional problem concerning the judicial function in relation to judicial finality. *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. The problem is rather a practical one. Conceivably a stalemate might arise between Commission and court. Some help may be afforded by an appeal to the circuit court of appeals from an order fixing allowances within the maximum, or disapproving the plan for inadequate allowances. The appellate court could revise the maximum downward or direct that the case be remanded to the Commission with an opinion setting forth its reasons why the Commission should consider an upward revision.

This system of judicial review is admittedly cumbersome, and a construction of the statute which denied to the courts power to review a maximum would avoid some of the ob-

stacles. It is to be observed, however, that similar difficulties are inherent in the system of review of the plan of reorganization as a whole. The Act gives the district court power to approve or disapprove a plan, but not to draft a new plan. Consequently there is an even greater possibility of cumbrous proceedings than in the case of fees, where the court has power admittedly at least to make an independent downward revision.

2. In any event, whether or not the statute provides for judicial review of the Commission's maximum, the provision is valid. It is important to observe that even under this view of the statute not all issues relating to the allowance of compensation are foreclosed in the district court. This fact is amply demonstrated by the present litigation. Whether the statute applies to indenture trustees, whether it applies to payment out of mortgaged assets of the debtor, and whether the services in question were performed "in connection with" the reorganization proceedings are all questions which the district court may review within the limits ordinarily observed in passing upon the validity of administrative determinations. At most the immunity from review extends to the amount of the maximum.

In passing on the conclusiveness of such a determination, this Court has weighed numerous considerations, in particular the nature of the claim asserted, the character of the facts in issue, the nature of the tribunal, and the kind of procedure provided. *Dohany* v. *Rogers*, 281 U. S. 362, 369; Brandeis, J., concurring in *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 81. Here there are compelling considerations which support the validity of the statutory procedure. The claim is for attorneys' fees and trustee's compensation for services performed after the statutory procedure was established. The Commission is peculiarly qualified to pass on the maximum allowances, in the light of its intimate acquaintance with the proceedings, its opportunity to judge the extent and value of the services, and their contribution to the proceedings

and the possible duplications involved.[14] Moreover, the Commission is in a position to apply a uniform standard in the light of its experience as the central body administering railroad reorganizations. The procedure is not different in substance from that which obtains when a bankruptcy court is called on to allow compensation which has been fixed by a state court for persons employed in a prior phase of the proceedings. Cf. *Callaghan* v. *Reconstruction Finance Corporation*, 297 U. S. 464, 467. The allowances are matters which Congress itself could have fixed by an absolute standard, as it has done in Section 48 of the Act with respect to various classes of fees. Cf. *Calhoun* v. *Massie*, 253 U. S. 170; *Margolin* v. *United States*, 269 U. S. 93. There is thus no question of delegation of judicial power. *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381, 400.

Similar limitations on judicial review are not uncommon, and have repeatedly been upheld. Familiar instances include determinations of the value of merchandise under the customs laws, *Passavant* v. *United States*, 148 U. S. 214; certain determinations by the Secretary of the Interior in administering Indian Affairs, *First Moon* v. *White Tail*, 270 U. S. 243; determination by the Interstate Commerce Commission of deficits of carriers compensable under act of Congress, *Great Northern Railway* v. *United States*, 277 U. S. 172; determinations of value in state condemnation proceedings, *Crane* v. *Hahlo*, 258 U. S. 142.

Special reasons exist for the validity of a limitation on judicial review in the circumstances presented here. The claimants are fiduciaries, and their counsel entered upon the services in question after the statute had gone into effect, and can hardly be heard to complain of its procedural

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[14] As was said by Judge Evans in *In re Chicago, M., St. P. & P. R. Co.*, 121 F. (2d) 371, 375:

> "Moreover, the main services in a railroad reorganization occur in the I. C. C. and not in the District Court. The I. C. C. therefore is in the better position to know which attorneys rendered the more valuable assistance and which rendered services of no value to the debtor."

features.[15] Particularly is this true since under the statute their claims are given the status of administrative expenses and thus are accorded the highest priority. Having availed themselves of the opportunity to perform services for compensation under these terms of the Act, the trustee's counsel cannot now attack its procedural conditions. Cf. *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411-412; *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581; *Atlantic Refining Co.* v. *Virginia*, 302 U. S. 22, 32-33.[16] The trustee's claim for its own compensation stands on no better footing than that for attorneys' fees. Under the terms of its indenture, it could have withdrawn as trustee upon the institution of the bankruptcy proceedings, and it could have done so without sacrifice of invested capital.[17] Apart from this, it was entitled under the indenture simply to "reasonable compensation". The trustee's claim is in essence a demand that its compensation be liquidated by one procedure rather than another. But "No one has a vested right in any given mode of procedure" (*Crane* v. *Hahlo*, *supra*, at 147). As we have pointed out, the claim might have been liquidated by legislative act. Or it might have been required to be liquidated by arbitration. Cf. *Hardware Dealers' Mutual Fire Insurance Company* v. *Glidden*, 284 U. S. 151. Certainly it cannot be maintained that the procedure prescribed, equivalent as it is to a judicial hearing, is any less adequate.

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[15] While nominally the trustee is the claimant, the greater part of the amount sought is asked as reasonable compensation for attorneys' fees. Although these have been paid by the trustee in the amounts requested, the payments were "made subject to their being finally determined to be 'reasonable expenses necessarily incurred and actually disbursed' under the Mortgage" (R. 31).

[16] This is not a case where the conditions might impair interests beyond those of the parties themselves, as for example conditions which might limit the exercise of freedom of speech or burden interstate commerce.

[17] See *supra* p. 28.

The cases relied on by respondent to elevate the amount of its claim for compensation and expenses to a constitutional level are manifestly inapplicable. They deal with the regulation of public utility rates, and in their broadest reach they have never been thought to apply to claims for personal services. *Acker* v. *United States*, 298 U. S. 426.

## CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court for further proceedings in conformity with the statute.

Respectfully submitted,

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## APPENDIX A.

The provisions of Section 77 (11 U. S. C., Section 205), as amended, pertinent in this case are the following:

**Section 205. Reorganization of railroads engaged in interstate commerce. (a) Petition for reorganization by railroad, subsidiary or creditors; venue; proceedings thereon; jurisdiction of court over debtor and property.**

Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"):

* * * * *

**(b) Plan of reorganization, contents; "securities", "stockholders", "creditors", "claims" defined; suspension of statutes of limitation.**

A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (in-

cluding fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan or reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been

previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "*creditors*" shall include, for all purposes of this section *all holders of claims of whatever character* against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "*claims*" *includes debts*, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), *liens*, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) of this section.

The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

**(c) Proceedings after approval of petition.**

After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon August 27, 1935) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the ap-

pointment of such legal counsel for the trustees as they shall select, with power of removal. *The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable.* The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by chapter 1 of Title 49 as on August 27, 1935, or thereafter amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

* * * * *

(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 25 of this title, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each

bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) It shall be the duty of anyone having information as to the names and addresses of the holders of any securities of the debtor to divulge such information to the trustee or trustees, upon written request therefor and, upon petition by any party in interest, and after hearing, the judge may order the production of any such information by anyone having and refusing to divulge it to any trustee, upon written request therefor. The judge may direct that the cost of preparing such information shall be borne by the *debtor's estate.*

* * * *

(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or secuirties to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) *The judge shall cause reasonable notice of the period* in which claims may be filed, of hearings on application for the dismissal of the proceedings, or *for the final allowance of fees or expenses* to be given creditor and stockholders by publication or otherwise.

* * * * * *

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; *and thereafter such segregation and allocation may be made at the expense of the debtor's estate.*

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. *The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.*

(12) *Within such maximum limits as are fixed by the Commission, the judge may make an allowance, to be paid out of the debtor's estate, for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and within such limits may make an allowance to be paid out of the debtor's estate for the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries and such assistants as the Commission with the approval of the judge may especially employ. Appeals from orders of the court fixing such allowances may be taken to the circuit court of appeals independently of other appeals in the proceeding and shall be heard summarily. The Commission shall, at such time or times as it may deem appropriate, after hearing, fix the maximum allowances which may be allowed by the court pursuant to the provisions of paragraph (12) of this subsection (c) and, after hearing if the Commission shall deem it necessary, the maximum compensation which may be allowed by the court pursuant to the provisions of paragraph (2) of this subsection (c).*

(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and *may allow such master a reasonable compensation for his services and actual and reasonable expenses.* The circuit court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however,*

That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

**(d) Time for filing plan of reorganization; hearings by Commission; certification of approval to court.**

The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class; or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it

shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (c) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

**(c) Court hearing after approval by Commission; acceptance of plan by creditors and stockholders; confirmation of plan by court; valuation of property.**

Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable

treatment. After such hearing, and without any hearing if no objections are filed, *the judge shall approve the plan if satified that:* (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) *the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization,* have been fully disclosed so far as they can be ascertained at the date of such hearing, *are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge;* (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

*If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action,* in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commis-

sion to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the

President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. *The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate.* The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e):

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If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including

the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceedings hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

**(f) Binding effect of confirmation; discharge of debtor from liabilities; issuance of securities.**

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the

decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.

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**(g) Dismissal of proceedings because of undue delay in reorganization.**

If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an

order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

* * * *

**(i) Transfer of title between receivers and trustees or to debtor; "Federal court" defined.**

If a receiver or trustee of all or any part of the property of a debtor has been appointed by a Federal or State court, whether before or after August 27, 1935, a petition or answer may be filed under this section at any time thereafter by such debtor, or its creditors as provided in subsection (a) of this section, and if such petition is approved, the trustee or trustees appointed under this section, or the debtor until such trustee or trustees are appointed, shall be entitled forthwith to possession of and be vested with title to such property, and the *judge shall make such orders as he may deem equitable* for the protection of obligations incurred by the receiver or receivers or prior trustee or trustees and *for the payment of such reasonable administrative expenses and allowances in the prior proceedings as may be fixed by the court appointing such receiver or trustee.* Whether or not a receiver or trustee has been appointed by a Federal or State court prior or subsequent to the institution of a proceeding under this section and upon the dismissal of such proceeding under this section, the judge may include in the order of dismissal appropriate provisions directing the trustee or trustees, or the debtor if no trustee has been appointed, at the time of such order of dismissal, to transfer possession of the debtor's property within the territorial jurisdiction of such Federal or State court to the prior receiver or trustee, if a prior receiver or trustee has been so appointed by such Federal or State court, or to a receiver or trustee appointed by such Federal or State court, upon such terms as the court in the proceeding under this section may deem equitable for the protection of the obligations incurred by any trustee or trustees appointed under this

section and for the payment of administrative expenses and allowances in the proceedings hereunder. Upon the filing of such order of dismissal all title to the property in the trust estate shall vest as therein provided. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this title is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska.

**(j) Restraining or staying commencement or continuation of proceedings against debtor; removal of causes; owners' rights to equipment leased or conditionally sold unaffected.**

In addition to the provisions of section 29 of this title for the staying of pending suits against the debtor, the judge may enjoin or stay the commencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceedings to enforce *any lien upon the estate* until after final decree: *Provided*, That suits or claims for damages caused by the operation of trains, busses, or other means of transportation may be filed and prosecuted to judgment in any court of competent jurisdiction and any order staying the prosecution of any such cause of action or appeal shall be vacated. Proceedings under this section prior to its amendment by Act of August 27, 1935, or under this section as amended by such Act, shall not be grounds for the removal of any cause of action to the United States District Court which was not removable before March 3, 1933 and any order removing any cause of action or enjoining the prosecution of any such cause of action in any court is null and void and any cause of action heretofore removed from a State court on account of this section prior to its amendment by Act of August 27, 1935, shall be remanded to the court from which it was removed. The title of any owner, whether as trustee or other-

wise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this section.

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**(l) Jurisdiction of court, duties of debtor and rights of creditors same as in voluntary bankruptcy.**

In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

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**(o) Abandonment or sale of lines or property.**

The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings *in the interest of the debtor's estate* and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by chapter [illegible] of Title 49, as amended February 28, 1920, or as it may hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment

or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. *The expense of such sale shall be borne in such manner as the judge may determine to be equitable.* The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

**(p) Solicitation of proxies or authorizations.**

It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in any such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor

to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, *and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services)* upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, *the Commission after hearing by order authorizes such solicitation, use, employment, or action: Provided, however,* That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed *are reasonable*, fair and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respect-

ing such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

* * * * *

The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to August 27, 1935, in connection with proceedings under this section as in force prior to such date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority

to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided, That with respect to committees which are not subject to this subsection* (p), *the judge* shall scrutinize and *may disregard any limitations* or provisions of any deposit agreements, committee, or other authorizations affecting any creditor or stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power *which he finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses.*

**(q) Application of law granting powers to the Commission.**

The provisions of section 12 of Title 49 shall be applicable to enable the Commission to perform its duties under this section and the provisions of such section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

* * * *

July 1, 1898, ch. 541, §77, as added Mar. 3, 1933, ch. 204, § 1, 47 Stat. 1474, and amended Aug. 27, 1935, ch. 774, 49 Stat. 911; June 26, 1936, ch. 833, 49 Stat. 1969; Aug. 11, 1939, ch. 689, 53 Stat. 1406; boldface captions taken from U. S. Code, not in Statutes at Large, italics added except in phrases "Provided", "Provided, however", "Provided further".

## APPENDIX B.

In the District Court of the United States for the District of Connecticut.

No. 16562.

In Proceedings for the Reorganization of a Railroad.

In the Matter of the New York, New Haven and Hartford Railroad Company, Debtor.

Memorandum of Decision on Motions to Dismiss Petitions for Orders 492 and 611.

These petitions are brought each by an indenture trustee, No. 492 by Bankers Trust Company as trustee under the First and Refunding Mortgage and No. 611 by Irving Trust Company as trustee under a Collateral Trust Indenture, asking the Court without reference to or restriction by any maximum allowances set by the Interstate Commerce Commission in these proceedings to adjudicate the amounts on account of the services and expenses of the respective petitioners and their counsel in these proceedings; to decree that the allowances thus established constitute under the provisions of the respective indentures prior liens in favor of the petitioners upon the respective mortgaged properties, or upon securities to be issued to the bondholders secured thereby; and to enforce said liens.

The matter is before the Court upon motions to dismiss these petitions filed and pressed by the Interstate Commerce Commission through its counsel, by the New Haven Trustees, and by Reconstruction Finance Corp., a collateral noteholder in these proceedings. The petitions have also been opposed by brief in behalf of the Mutual Savings Bank Group.

### I.

I hold that the services rendered and expenses incurred by the petitioners and their attorneys are covered by the liens of the respective mortgage indentures in so far as

said services were reasonably necessary and adapted (a) to protect and advance in these proceedings the interests of the underlying bondholders, (b) to advance the achievement of reorganization, and (c) to protect the mortgage trustee from personal liabilities for which under the mortgage it has a right of indemnity against the debtor's estate.

I cannot accept the view that the petitioners were acting as mere volunteers in the premises. They were acting at least in substantial part under the contract of the trust indenture whereby they were expressly entitled to "reasonable compensation" and to "reimbursement of reasonable expenses, including counsel fees" for all services rendered "in the execution of the trusts hereby created". The indenture was drawn long prior to the enactment of Section 77. It provided that in case of default the petitioner, as also bondholders, might enter upon and operate the mortgaged property for the benefit of all bondholders; also that the petitioner might foreclose the mortgage and obtain a receiver.

I think no one will dispute that the petitioners would have been remiss in their proper discharge of their trusts if in an equity receivership they had left their cestuis without representation or after default had failed to take appropriate action for their protection. Certainly this equitable obligation was not precisely to be measured by their possible liability in an action at law for nonfeasance. I find nothing in Section 77 which exonerates mortgage trustees from their equitable obligation to take action appropriate to the same objective. Such a view, indeed, seems repugnant to Congressional policy as declared in the Trust Indenture Act of 1939. See 15 U.S.C.A. 77bbb and 77ooo (c).

To be sure, the Bankruptcy Act substitutes statutory remedies for the remedies incident to an equity receivership: to the extent that the new remedies vary from the old the course of activity by a mortgage trustee and much of the incidental—but inescapable—detail requires adapta-

tion to that change. But this change did not extinguish any rights or obligations growing out of the mortgage indenture nor transform the status of the petitioners from that of responsible trustees to that of volunteers. And the activities reasonably required for their own protection and for the protection of their bondholders under the exigencies of reorganization under Section 77, as indeed also services contributing to the achievement of reorganization, fell within the lien of the mortgage contracts. Cf. *Straus v. Baker, Co.*, 87 Fed. (2nd) 401, at page 408.

I notice that the Commission has made a distinction between "regular and routine services performed in administering the trust, ordinarily covered by an annual maintenance fees" and other "special" services performed in the reorganization proceedings. This distinction seems to me entirely valid. Such routine services cannot constitute allowances in the reorganization proceedings and are not subject to the jurisdiction of the Commission, because they are not "incurred in connection with the proceedings and plan", as specified under subdivision (c) (12). Nevertheless, both the routine services and the services in the reorganization proceedings may be covered by the lien of the mortgage indenture.

## II.

I hold that all compensable services and expenses of the petitioners which were incurred in connection with the proceedings and plan fall within the provisions of Section 77 (c) (12).

Just as Section 77 provides a technique of reorganization which does not require the enforcement of mortgage liens, so it contemplates by subdivision (c) (12) a technique for the liquidation and discharge of contractual claims for services which obviates the necessity of the foreclosure of the covering liens. And the fact that the services and expenses of these petitioners happen to be the subject-matter of contract liens no more excludes their allowance from the effect of (c) (12) than the existence of outstanding mortgages op-

erates to immunize the bondholders secured thereby from the other provisions of the Act which contemplate that their claims may be discharged by the substitution of securities of equivalent value under a plan which satisfies the requirements of the Act. The petitioners' contract provided that they should receive reasonable compensation and reimbursement. The same standard of liquidation is prescribed by Section 77. Only the method and the forum for accomplishing the liquidation is changed.

The language of (c) (12) specifies a single method which shall apply to all parties alike. That Congress indeed intended that subdivision (c) (12) should apply to Indenture Trustees who might happen to have a lien, as well as to other parties in interest and committees who were without a lien, abundantly appears from the legislative history of the Act. There is thus no occasion for the modification of the inclusive language of (c) (12) by the process of construction.

And certainly the construction advanced by the petitioners is inadmissible. They point to the language of (c) (12) under which the court may order the allowances thereby authorized to be paid "out of the debtor's estate". I agree that this language is broad enough to authorize in a proper case payment from the free (unmortgaged) assets of the estate. In this respect, perhaps the Act goes further than the equitable rule whereby allowances for services in behalf of mortgaged property might be charged against the mortgaged assets. But I cannot agree that the scope of (c) (12) is limited to such allowances as may only be charged against the general (unmortgaged) estate. The language used, viz., "the debtor's estate", is broad enough to include the mortgaged assets as well as the free assets. And if the *enforcement* provisions of (c) (12) are entitled to this broad construction, as I hold, there is no room left for the argument that the *liquidation* provisions of (c) (12) with the accompanying grant of jurisdiction to the Commission must by a narrower process of construction be confined to services not covered by lien.

III.

Nor is the Act, thus construed, unconstitutional.

The petitioners' liens are not impaired. Like the liens of all the mortgagees and pledgees in these proceedings, the remedy only is suspended. If these proceedings shall be dismissed, the lien forthwith becomes enforceable with all its pristine vigor. Such a suspension of the remedy is not inconsistent with the Constitution. *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648. Cf. *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, at 279.

The petitioners further complain that under the Act, as I have construed it, they are deprived of all right to judicial review of a decision by the Commission which seems to liquidate, at least in one dimension, their contractual right to compensation. This complaint is unfounded.

For under subdivision (e) (2) the Judge may approve a plan only if "satisfied" that all allowances "for expenses and fees incident to the reorganization . . . are within such maximum limits as are fixed by the Commission" *and are "reasonable"*. Thus the petitioners' liens can be extinguished through a discharge of their claims in these proceedings only if the maxima set by the Commission are such that the allowances made thereunder by the Judge are found by the Judge to be reasonable.

And if the Judge shall not be satisfied that such maxima permit of allowances which are reasonable, under the Act the Judge may return the petition for reconsideration by the Commission. Such is the view of the parties opposing petitions 492 and 611, including counsel for the Commission. The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as "reasonable" although convinced that it was inadequate. Such a law would stultify both author and agent. Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible creditor and class participation in reorganizations. This policy, in a sense, is paramount to

the policy of economy in administration; were it otherwise the Act would have prohibited all allowance of compensation to the parties from the estate. But plainly Congress did not want costless reorganizations rather than just reorganizations. It follows that the true policy relating to economy is one adapted to preclude excessive expense,—not to enforce inadequate compensation. Thus understood, the policy collides not at all with that of encouraging useful and responsible creditor representation by the allowance of adequate compensation through which that objective can be achieved.

This view is also completely in harmony with the underlying scheme of the Act. For the Act charges the Commission with the responsibility of determining values and of formulating plans. Yet the plans thus reported can be approved by the Judge only if he is satisfied that they are fair; if not thus satisfied, unless he dismisses the proceedings, he can only return the plan to the Commission for further consideration. And so as to a maximum allowance set by the Commission. The Judge can approve the plan only if satisfied that all allowances are within the maxima set by the Commission *and are reasonable;* failing that, he can only dismiss the proceedings or "refer the proceedings back to the Commission for further action" (subdivision (e), second paragraph). Surely under this provision if the Judge's disapproval were limited to the maxima set by the Commission upon specified petitions for allowances, he need not refer back the substantial provisions of a reported plan: a re-reference of those specified petitions would suffice, accompanied by his "opinion stating his conclusions and the reasons therefor."

To be sure, this seems a cumbersome procedure for the liquidation of an allowance. Indeed, theoretically at least, the procedure may produce a deadlock between the Commission and the Judge which may ultimately block a reorganization. Yet from a practical standpoint, as Congress apparently perceived, in almost every case in which

reorganization is indeed feasible a considered exchange of views between the Commission and the Judge will result in a final agreement purged of inadvertence and extravagance which shall permit of a fair appraisal of services under the particular eye of the Commission and services relating principally to activities before the Judge. Anyhow, Congress deemed it wise to condition the privilege of reorganization upon such an agreement. And if ever a case shall arise resulting in a final deadlock instead of agreement, perhaps the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission. However that may be, the petitioners here cannot justly complain that their rights have been insulated from judicial review when judicial sanction is required for the liquidation and discharge of their claims in the bankruptcy proceedings and in the event that the bankruptcy proceedings are dismissed their claims and covering liens are left unimpaired for adjudication elsewhere.

Thus any question as to the validity of an exclusive grant of jurisdiction to the Commission to fix, or even limit, allowances is not involved under the Act. And there is no basis for the constitutional objection which the petitioners invoke.

On these conclusions, the motions to dismiss petitions 492 and 611 must be granted. For these petitions are neither appropriate nor necessary to raise in issue in these proceedings the reasonableness of the maxima allowed by the Commission. That issue was available to the petitioners at the hearing in this court upon their applications for allowances after the Commission had set maxima under Section 77 (c) (12). On that record without any further expansion, it lay within the power of this Court in these proceedings either to order allowances within the limits of the maxima or to return the applications to the Commission for further action on the ground that the maxima did not permit of adequate compensation.

Nor can the bankruptcy court in these proceedings enforce the petitioners' liens. For the liens are suspended during these proceedings: they may be enforced only if these proceedings are dismissed.

An appropriate order may be submitted.

Dated at New Haven this 3rd day of June, 1942.

C. C. Hincks,
*United States District Judge.*

## APPENDIX C.

In the District Court of the United States for the Southern District of Iowa, Central Division

No. 9434—Bkptcy

IN THE MATTER OF THE FORT DODGE, DES MOINES & SOUTHERN RAILROAD COMPANY, DEBTOR

*Order*

This matter coming on for hearing on a Special Appearance of The New York Trust Company, as Trustee, challenging the jurisdiction of this court to refer certain questions regarding fees and expenses to the Interstate Commerce Commission. The Interstate Commerce Commission appears and resists the application. Due notice has been given to all parties in interest, and the matter set down for hearing on this date in open court at Des Moines, Iowa. The Interstate Commerce Commission appears by counsel but the New York Trust Company, as Trustee, does not appear by counsel, and the matter being informally discussed and being advised, the Court finds that the Special Appearance referred to should be and the same is overruled and denied.

It is further Ordered that the prior proceedings in this court in referring claims to the Interstate Commerce Commission for action thereon and including all claims for fees and expenses by or against the New York Trust Company, as Trustee, is confirmed and approved.

The New York Trust Company, as Trustee, excepts.

Signed at Des Moines, Iowa, this 9th day of September, 1941.

(Sgd.) CHAS. A. DEWEY,
*Judge, U. S. District Court.*